

STATE OF MICHIGAN
COURT OF APPEALS

BRETT EARL FRYE,

Plaintiff-Appellant,

v

MARY DONNA POLICHT,

Defendant-Appellee.

UNPUBLISHED

April 13, 2004

No. 249541

Wayne Circuit Court

LC No. 98-806957-DC

Before: Talbot, P.J., Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the order denying his motion to change custody of his minor child from defendant. We affirm.

First, plaintiff argues that the trial court erred in failing to hold an evidentiary hearing on the best interests of the child under MCL 722.23, before denying his motion. We disagree. All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877, 900; 526 NW2d 889 (1994); *Harvey v Harvey*, 257 Mich App 278, 283; 668 NW2d 187 (2003). The great weight of the evidence standard applies to all findings of fact and will be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher, supra* at 879, 900; *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

The child custody act was intended to minimize unwarranted changes in custody. *Baker v Baker*, 411 Mich 567, 577; 309 NW2d 532 (1981). Before an evidentiary hearing can be held on a motion to change custody, the moving party must establish proper cause or change in circumstances. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, ___ Mich App ___, ___ NW2d ___ (Docket No 248058, issued December 2, 2003, updated February 13, 2004), slip op, p 6. A trial court will not consider a change in custody unless there are appropriate grounds which have or could have a significant impact on the child's life such that a reevaluation of custody should be made. *Vodvarka, supra*, slip op, p 7. The determination of proper cause is based on the statutory best interest factors, on a case-by-case basis. *Id.* To constitute a change of circumstances meriting a consideration of a custody change, there must have been a change in conditions pertaining to custody since the entry of the last custody order which has or could have a significant impact on the child's well being. *Id.*

Here, the trial court's conclusion, that plaintiff failed to establish a change in circumstances or proper cause to change custody so as to require an evidentiary hearing, was not against the great weight of the evidence. Plaintiff alleged inappropriate sexual behavior by the parties' minor child. In response, the trial court expanded plaintiff's parenting time until an investigation could be completed by the Family Independence Agency (FIA), but did not change custody.

After investigation, the FIA concluded that there was not "a preponderance of evidence of sexual abuse, neglect, or improper supervision," but noted that the child's behavior was disturbing. The psychological assessment of the child also concluded that he was not credible with regard to his stories of sexual behavior and that his manipulative behavior and lying presented a problem. The evidence presented by these evaluations preponderated in favor of a finding that the alleged sexual behavior did not occur, and thus, did not constitute a change in circumstance or proper cause to change the custodial environment. Plaintiff argues that the child's manipulative behavior constituted a change in circumstances meriting an evidentiary hearing regardless of the veracity of the allegations of sexual behavior. The FIA report, however, indicated that plaintiff may have "manipulated or rehearsed" the child to lie, and the psychological assessment stated that defendant might be the parent better able to cope constructively with the child's behavior. Therefore, even if the child's behavior constituted a change in circumstances, we are not convinced that a reevaluation of custody should be undertaken on this basis. *Vodvarka, supra*, slip op, p 7.

Plaintiff also asserts that the trial court's failure to hold an evidentiary hearing on the best interest factors was error where the trial court found there was a change of circumstances. While the trial court did make a remark regarding changed circumstances, it is clear from the context that the court was noting the need for further investigation of the child's problems, and not making a finding of fact for the purpose of changing custody. The court subsequently made clear that it did not believe a change of custody was warranted but that the parties needed to go to mediation to learn to work together to come up with a plan to help the child. In the final hearing on this issue, and in the order denying plaintiff's motion to change custody, the trial court clearly stated that there was no change of circumstances. It is axiomatic that a court speaks through its judgments and decrees and not through its oral statements. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). The trial court's comment did not constitute a finding of fact so as to trigger an evidentiary hearing. The language of the court's order prevails, and the finding, that there was no change in circumstances, was not against the great weight of the evidence. The trial court did not err in failing to hold an evidentiary hearing.

We also disagree with plaintiff's claim that the trial court erred in failing to hold an evidentiary hearing on the existence of a custodial environment before restoring custody to defendant. To modify a custody award, the moving party must show proper cause or change of circumstances which establishes that the modification is in the child's best interest and this must be established before the existence of an established custodial environment and the best interest factors may be considered through an evidentiary hearing. MCL 722.27(1)(c); *Vodvarka, supra*, slip op, pp 5-6. Here, as previously noted, the trial court never changed custody from defendant to plaintiff in the first place and so did not restore custody to defendant in its order. The trial court expanded plaintiff's parenting time in May 2002, and then modified that parenting time in its order denying plaintiff's motion to change custody. Because plaintiff never had physical

custody of the minor child, there can be no error in the court's failure to hold an evidentiary hearing before denying the motion to change custody.

Finally, plaintiff argues that the trial court should not have held a motion hearing because plaintiff did not receive defendant's brief in conformance within the time requirements of MCR 2.119(C)(1). Service upon plaintiff of defendant's written motion did not conform to the court rule. However, this failure did not prejudice plaintiff. Plaintiff's counsel received the motion by fax a week before the hearing. Plaintiff's counsel was able to present a response to the motion to the court and was prepared to proceed on the date of the hearing. Further, plaintiff's counsel admitted on the record that the issues presented in defendant's motion had been previously litigated by the parties and presented no surprises to either party. For these reasons, even if service was not in strict conformance with MCR 2.119(C)(1), our refusal to disturb the trial court's order is not inconsistent with substantial justice. MCR 2.613(A).

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Pat M. Donofrio